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No. 809

IN THE

Supreme Court of the United States

October Term, 1959

PAUL E. KERN, JEROME PRINCE, and CHARLOTTE HEINE, *Petitioners*,

v.

THE COLUMBIA GAS SYSTEM, INC., et al., *Respondents*.

BRIEF OF RESPONDENT BEN WILLIAMSON, JR., TRUSTEE OF INLAND GAS CORPORATION AND KENTUCKY FUEL GAS CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SELDEN S. McNEER
1000 First Huntington National Bank Building
Huntington, West Virginia
Counsel for respondent Ben Williamson, Jr., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation

Campbell, McNeer, Woods & Bagley
Robert K. Emerson
Of Counsel.

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ABBREVIATIONS

American:	American Fuel & Power Company, one of the Debtors.
American Notes:	Five-Year 7% Convertible Gold Notes, due July 1, 1934, of American Fuel and Power Company.
American Trustee:	Clinton M. Harbison, Trustee of American Fuel & Power Company.
Columbia:	The Columbia Gas System, Inc., formerly Columbia Gas & Electric Corporation.
Debtors:	Inland Gas Corporation, American Fuel & Power Company, and Kentucky Fuel Gas Corporation.
Inland:	Inland Gas Corporation, one of the Debtors.
Inland Bonds:	First Mortgage 6½% Sinking Fund Gold Bonds of Inland Gas Corporation.
Inland Debentures:	Second Mortgage 10-Year 7% Sinking Fund Debentures of Inland Gas Corporation
Inland Trustee:	Ben Williamson, Jr., Trustee of Inland Gas Corporation

Kentucky:	Kentucky Fuel Gas Corporation, one of the Debtors
Kentucky Bonds:	First Mortgage 6½% Sinking Fund Gold Bonds of Kentucky Fuel Gas Corporation
Kentucky Debentures:	10-Year Convertible 6½% Sinking Fund Gold Debentures of Kentucky Fuel Gas Corporation
Kentucky public creditors:	The holders of Kentucky Bonds and Debentures, other than Columbia Gas System, Inc.
Postbankruptcy interest:	Interest accruing after institution of equity receivership proceedings for each of the Debtors
Prebankruptcy interest:	Interest unpaid at date of institution of equity receivership proceedings for each of the Debtors

Emphasis has been supplied to quotations in which emphasis appears.

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BRIEF OF RESPONDENT BEN WILLIAMSON, JR., TRUSTEE OF INLAND GAS CORPORATION AND KENTUCKY FUEL GAS CORPORATION, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Counterstatement of Questions Presented

Under the heading "Questions Presented" Petitioners state two questions. Neither is presented by the decision of the Court of Appeals.

The decision *was not,* as Petitioners say in their first question, that a District Court "may refuse to hear, prior to consummation of a confirmed plan, a proposed *alteration* * * * " of that plan. The decision *was* that after a plan has been confirmed, a District Court should decline to permit a new plan (however disguised) to be filed, even though the confirmed plan has not yet been consummated. In determining when proposed changes are "alterations and modifications" and when they amount to a new plan, the proper exercise of discretion by the District Court

under Section 222 of the Bankruptcy Act is necessarily involved. In the instant case the Court of Appeals held that the District Court properly exercised its discretion in this respect. Therefore, we re-state the question presented as follows:

> **Did the District Court abuse its discretion when, in a corporate reorganization proceeding under Chapter X of the Bankruptcy Act, after confirmation of a plan but prior to consummation, it rejected so-called "Alterations and Modifications" which changed all material provisions of the plan and which the District Court expressly found to be not congruent with the plan but to constitute a new plan?**

Petitioners' second question involving the right of Kentucky creditors to postbankruptcy interest from Inland's assets arises only as part of a new plan. The District Court properly declined to permit a new plan to be filed after confirmation. Therefore, this question is not presented on this record.

Counterstatement of the Case

These proceedings have been in court since December 2, 1930, first as an equity receivership, afterwards as proceedings under Section 77B of the Bankruptcy Act, and finally as corporate reorganization proceedings under Chapter X of the Bankruptcy Act. The affairs of the debtor corporations and the history of these proceedings are fully disclosed in the opinions of the Court of Appeals in the eleven decisions listed in the majority opinion in the instant case (Pet. App. B, p. 5c). Furthermore, this Court has more than a passing acquaintance with these proceedings, having denied numerous petitions for writs of certiorari and petitions seeking rehearing on the denial of a petition for writ of certiorari and having once granted certiorari. *Vanston v. Green*, 329 U.S. 156.

It may be convenient, however, to review a few facts. Inland and Kentucky were incorporated for the purpose of engaging in the production, transportation, and sale of natural gas in eastern Kentucky. American was intended primarily as a holding company. It owned 72.6% of the stock of Inland and 91.12% of the stock of Kentucky. Each company had substantial issues of debt securities, which were in default in 1930. Among others were Kentucky bonds (principal $2,236,600, interest to December 31, 1957, $3,644,645)* and Kentucky debentures (principal $542,000, interest to December 31, 1957, $971,760)*. Kentucky's assets are less than $10,000. Consequently, the Kentucky bonds and debentures would be worthless but for the decision of the Court of Appeals that holders of Kentucky bonds and debentures are quasi creditors of Inland to the extent of principal and pre-bankruptcy interest, but not postbankruptcy interest (187 F. 2d 813; 241 F. 2d 374; 262 F. 2d 510). Columbia's secured claims against Inland are principal $2,143,467, interest to December 31, 1957, $3,199,519. It also holds unsecured claims against Inland and large claims against American and Kentucky. By prior decisions of the Court of Appeals, all of Columbia's claims were subordinated to the claims of all other creditors of Inland.

The principal petitioner here, Paul E. Kern, was not an original investor in the Kentucky bonds and debentures, but bought them from time to time during the course of these proceedings, principally in 1952, 1953, and 1954, until he owns thirty-four per cent of the outstanding bonds and some debentures.* (241 F.

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* Not including bonds and debentures owned by Columbia.

2d 374, 376. See also the majority opinion in the instant case, Pet. App. B p. 6c.)

In recent years various plans of reorganization have been under consideration and much time has been spent in efforts to formulate a plan which would be fair and equitable and feasible and to the best interests of the creditors, but, notwithstanding all such efforts, it has thus far been impossible to consummate a plan.

In 1952 a plan, prepared by the Trustees, was under consideration by the District Court, when Kern asserted several claims in behalf of Kentucky against Inland and American and demanded the appointment of a new trustee for Kentucky and independent counsel for the Kentucky trustee. The claims asserted by Kern were almost identical to claims that previously had been presented on behalf of Kentucky and which the District Court had rejected. Nevertheless the District Court again heard and again adjudicated these claims asserted by Kern, and, by an order entered October 6, 1952, denied such claims and denied Kern's request with respect to the Kentucky trustee and his counsel. Kern appealed to the Court of Appeals from such adjudication, and the order of the District Court was affirmed December 4, 1953 (208 F. 2d 13). The delay resulting from this appeal was approximately fourteen months.

Hearings then proceeded in the District Court, with the result that, by an order entered February 12, 1953, a plan of reorganization, identified as "Plan of Reorganization dated February 12, 1953," was found to be fair and equitable and feasible. Kern appealed, his principal contention being that the public creditors of Kentucky were entitled to *pari passu*

treatment with the public creditors of American. The Court of Appeals affirmed on March 18, 1954 (211 F. 2d 381). Kern then filed a petition for a writ of certiorari, which was denied October 14, 1954 (348 U. S. 840). This round of appeals consumed approximately nineteen months and prevented any reorganization during that period. Although the finding of the District Court that the plan of reorganization of February 12, 1953, was fair and equitable and feasible was affirmed by the Court of Appeals, delay resulting from appellate litigation prevented the confirmation and consummation of that plan.

In 1955 lengthy proceedings were conducted in the District Court with respect to a plan of reorganization based on a proposed cash sale. This plan was found by the District Court to be fair and equitable and feasible in December, 1955. Kern promptly noted an appeal. The Inland Trustee moved the Court of Appeals to dismiss that appeal on the ground that it was frivolous and taken merely for the purpose of delay. Prior to the decision of the Court of Appeals on that motion, Kern withdrew his appeal.

Early in 1956 the sale plan of reorganization, based upon a proposed cash sale to Tennessee Gas Transmission Co., was submitted to the Kentucky public creditors for acceptance. Kern, however, bitterly opposed acceptance and circularized other owners of Kentucky securities, and by this means and by his ownership of Kentucky bonds, which at that time had risen to 34% of those publicly held, was able to veto that plan. The American Trustee moved the Court to confirm the plan despite Kern's veto, but the Court refused. One of the reasons for the refusal was

that the plan provided for postbankruptcy interest to the public holders of Kentucky bonds and debentures, and the District Court held that they were not entitled to postbankruptcy interest from Inland's assets.

The District Court's order was entered on March 14, 1956. Kern and others appealed from that order. On appeal, the District Court's order was affirmed February 14, 1957 (241 F. 2d 374). Kern and others filed petitions for rehearing, which were denied. Petitions for writs of certiorari were then filed, which were denied October 14, 1957 (355 U. S. 838). Kern, on November 1, 1957, petitioned this Court for a rehearing of the denial of his petition for a writ of certiorari, and that petition was denied November 18, 1957 (355 U. S. 879). This round of appeals consumed another nineteen months, during which time all efforts to reorganize the Debtors were of necessity suspended. Meanwhile, the offer of Tennessee Gas Transmission Company to purchase the Debtors' properties was withdrawn, and no similar offer could be obtained by the Trustees. Thus any chance of a plan of reorganization based upon a cash sale was lost.

The order of the District Court entered March 14, 1956, which was affirmed by the Court of Appeals as above stated, directed the Inland Trustee and the American Trustee "* * * to prepare and file a new plan of reorganization which will eliminate the recovery of postbankruptcy interest by the public creditors of Kentucky Fuel Gas Corporation." And from the Bench the District Court directed that the new plan be submitted for acceptance to Columbia only. As soon as appellate review, as mentioned above, was completed, the two Trustees began the preparation of a new plan,

as directed by said order. The new plan, called "Plan of Reorganization dated February 25, 1958, as Amended," was duly filed in the District Court, and, after appropriate hearings, that Court entered an order May 13, 1958, finding the Plan to be fair and equitable and feasible, and, after further appropriate proceedings, that Court entered an order on June 2, 1958, confirming the plan.

Kern and others appealed from the orders of May 13, 1958, and June 2, 1958. Shortly thereafter the American Trustee moved the Court of Appeals to dismiss all such appeals as frivolous and taken merely for the purpose of delay. The Inland Trustee supported that motion. After comprehensive briefs were filed and after oral argument, the Court of Appeals sustained the motion of the American Trustee and dismissed the appeals. The decision was handed down January 15, 1959 (262 F. 2d 510). Issuance of the mandates was stayed upon application pending final disposition by this Court of petitions for certiorari which were filed by Kern and others. This Court denied such petitions on April 27, 1959 (359 U. S. 979). These proceedings consumed about eleven months.

The plan provides that steps should be taken to consummate it as soon as practicable following the date on which an order confirming it had become final and not subject to further review. Accordingly, promptly after denial of certiorari, counsel for the Inland Trustee began the preparation of various forms of documents which would be necessary in consummating the Plan, and, on May 13, 1959, filed a petition in the District Court for an order in aid of consummation of the plan. The petition did not raise any sub-

stantive questions, but merely sought an order to implement the District Court's decision confirming the plan.

On May 15, 1959, Kern and his associates filed in the District Court a motion for leave to file a petition for "Alterations and Modifications" of the plan. A hearing on the Inland Trustee's petition and Kern's motion was held in the District Court on May 28 and 29, 1959. By order entered on June 1, 1959, the District Court rejected the proposed petition for "Alterations and Modifications" and granted the petition of the Inland Trustee for an order to consummate the plan. Kern appealed, and the Court of Appeals affirmed the District Court January 27, 1960. This was the twelfth decision by the Court of Appeals in these proceedings. Kern now seeks review of said order and the decision of the Court of Appeals affirming it.

The Plan

To prepare the plan it was first necessary to fix the value of the assets of the debtors, and, after extensive hearings, the District Court, using the method approved by this Court (*Consolidated Rock Products Co. v. du Bois*, 312 U. S. 510), found the reorganization value of the Debtors' assets to be $10,538,800 as of December 31, 1957. No other valuation has been established. Nearly all of the assets were Inland's.

In very brief outline, the plan provides for the payment of reorganization expenses, taxes, etc., and unsecured claims against Inland, other than Columbia's, and then for payment in cash of

"(f) Claims of the holders, other than Columbia, of American Notes, including postbankruptcy interest.

"(g) Claims of the holders, other than Columbia, of Kentucky Bonds, excluding postbankruptcy interest.

"(h) Claims of the holders, other than Columbia, of Kentucky Debentures, including defaulted interest, but excluding postbankruptcy interest."

To enable the Trustees to pay the expenses and claims above referred to, the Inland Trustee was authorized to make a short-term borrowing from a bank of not to exceed $4,000,000. A new corporation is to be organized and the properties of the Debtors transferred to such new or reorganized corporation. The stock of the reorganized corporation will be issued to an escrow agent for the use and benefit of Columbia, such stock being valued by the plan at $3,021,576 as of December 31, 1957, and representing a partial payment on Columbia's secured direct claims against Inland.

Kern's so-called "Alterations and Modifications" begin by eliminating in its entirety Article I of the plan, which contains appropriate references to the District Court's directions (affirmed by the Court of Appeals) to the Trustees as to how the plan should be drawn and contains a statement of principles governing the reorganization. The Alterations then proceed to strike out everything in the plan except certain descriptive matter relating to the organization and history of the Debtors, and an entirely new plan is unfolded. Some of the important changes

proposed by the so-called "Alterations and Modifications" are stated in the majority opinion of the Court of Appeals (App. B of Petition, pp. 7c-9c).

Argument in Opposition to the Petition

I

The decision below does not present any important question of federal law.

Petitioners assume that the Court of Appeals (a) decided that a proposed alteration of a confirmed plan should be refused although the plan has not been consummated, and (b) ignored the solvency exception to the postbankruptcy interest rule. Both assumptions are incorrect, as we shall demonstrate.

In this case, which has been in court nearly thirty years, a plan of reorganization, after full hearings and all other proceedings required by law, was confirmed by the District Court. Appeals were taken from the confirmation order, and the District Court was affirmed by the Court of Appeals. This Court denied certiorari. Promptly thereafter the case came on for hearing on a petition by the Trustees for the entry of an order in aid of consummation of the confirmed plan. At this point Petitioners presented to the District Court so-called "Alterations and Modifications," which the Court found in fact constituted a new plan, and the Court refused to permit such new plan to be filed. The Court of Appeals affirmed. Thus the principal question presented is fairly stated above at page 2.

The majority opinion of the Court of Appeals very clearly shows that the District Court was affirmed

primarily on the ground that the so-called "Alterations and Modifications" were not that at all, but, in fact, constituted an entirely new plan. The following excerpts from the opinion, repeated here for convenience, are, we think, conclusive of this statement:

> "* * * A comparison of the proposed alterations and modifications of the Plan of Reorganization with the Plan, which we have heretofore affirmed, clearly reveals that the alterations and modifications under consideration are not merely such, but in totality *constitute an altogether new and different proposed plan of reorganization.*"
>
> "* * * *
>
> "Judge Ford stated that, had he sustained the position assumed by appellants and permitted the filing of their alterations or modifications, we would be 'starting fresh, turning around and going back on another theory.' We think the district judge did not abuse the discretion expressly granted him by the statute; but, on the contrary, we consider that he used sound common-sense, practical judgment in declining to permit an *altogether new plan* to be submitted, *under the guise of alterations and modifications*, in lieu of a sound plan already confirmed by him and approved by this appellate court, with certiorari denied by the Supreme Court of the United States."
>
> "* * * *
>
> "District Judge Ford aptly stated that section 222 authorizes modification, but does not authorize 'stopping in the middle of a

> stream and starting a new plan with all of its problems afresh.' We think that he wisely said, also, that the two plans 'are not kin in any respect in major problems', being incongruous rather than congruous."

That the decision is correct and the statement of the law contained in the majority opinion is sound appears from the statutes and the decisions. After a plan has been confirmed, and pending substantial consummation, the District Court may consider bona fide alterations and modifications, but may not consider a new or different plan, however disguised. Section 224 of the Bankruptcy Act provides that, upon confirmation, the plan and its provisions shall be binding upon the debtor and all creditors and stockholders. However, Section 222 provides that, before or after the plan is confirmed, it may be "altered or modified, with the approval of the judge." Then Section 229 defines when a plan shall be deemed to have been substantially consummated, and provides that after substantial consummation the plan may not be altered or modified if the proposed alterations or modifications materially or adversely affect creditors or stockholders.

Since Section 224 makes the plan binding upon the debtor and all stockholders and creditors from and after confirmation, a new plan may not thereafter be offered or considered. The only thing that can be done after such confirmation is that, under the provisions of Section 222, bona fide alterations and modifications may be filed with the approval of the District Judge whether or not they adversely affect the interests of creditors or stockholders. If they adversely

affect the interests of creditors or stockholders, further hearings are required; otherwise not. Anything that goes beyond a bona fide alteration or modification must necessarily constitute a new plan, and could not be filed or considered, because the provisions of Section 224 in effect forbid it. See *Diversey Building Corp. v. Metropolitan Trust Co.*, 141 F. 2d 65 (7 Cir. 1944); *Country Life Apartments v. Buckley*, 145 F. 2d 935 (2 Cir. 1944); *Knight v. Wertheim*, 158 F. 2d 838 (2 Cir. 1946) and *Prudence - Bonds Corp. v. City Bank Farmers Trust Co.*, 186 F. 2d 525 (2 Cir. 1951). Any other conclusion would mean that there is absolutely no finality to a Chapter X reorganization until substantial consummation of the plan, as provided in Section 229, and thus a case could be kept in court indefinitely after the confirmation of a plan by the simple expedient of filing new plan after new plan and appealing from adverse decisions of the District Judge. In the instant case the District Judge exercised his discretion, as provided in Section 222, and determined that the so-called "Alterations and Modifications" were not congruent with the plan and thus in effect constituted a new plan, and for that reason refused to permit them to be filed. The Court of Appeals affirmed, holding that the District Judge properly exercised his discretion. It is inconceivable that a matter of this sort would be regarded as an important question of federal law justifying the attention of the Supreme Court of the United States.

We do not wish to burden this Court with argument on Petitioners' second question as to their alleged right to receive postbankruptcy interest from Inland's assets. A brief statement will suffice.

It seems obvious that this question, since it is embodied in Petitioners' so-called "Alterations and Modifications" is properly presented only if the District Court abused its discretion in rejecting such "Alterations and Modifications." This it did not do. It may be noted, however, that, even if we assume for the sake of argument that the postbankruptcy interest question is properly before this Court, the Court of Appeals correctly construed its former decisions limiting the claims of the Kentucky creditors to principal. The only reason the Kentucky creditors are entitled to anything out of Inland's surplus assets is by the grace of the decision of the Court of Appeals. That same Court which created the right has very clearly limited it to principal with prebankruptcy interest, but not postbankruptcy interest (241 F. 2d 374; 262 F. 2d 510). The quantum of the claims of the Kentucky creditors depends upon the peculiar facts and equities of these proceedings, and we submit that the District Court and the Court of Appeals, by virtue of their long and intimate association with these proceedings, are uniquely qualified to determine the rights and equities of the Kentucky creditors, and these rights and equities have been litigated and re-litigated.

Under these circumstances, it can hardly be said that the postbankruptcy interest question is deserving of the attention of this Honorable Court.

II

There is no conflict between the decision below and *Knight* v. *Wertheim*, 158 F. 2d 838 (2 Cir. 1946).

Petitioners rely heavily upon a supposed conflict between the decision in the *Knight* case and the de-

cision in the instant case. In the *Knight* case the Court of Appeals held that the District Court erred in refusing to permit *bona fide amendments and modifications* to be filed after a plan had been confirmed but before it had been consummated. In the instant case the Court of Appeals held that the District Court did not err in refusing to permit a *new plan* to be filed after a plan had been confirmed but before it had been consummated. Thus there is no conflict. Again for convenience we quote from the majority opinion in the instant case to show how the matter was disposed of:

> "*Knight v. Wertheim*, 158 F. (2d) 838 (C. A. 2), is regarded by appellants as strong authority in their behalf. We do not agree with their argument for, in that case, Judge Learned Hand said that the proposed changes were not so radical as to fall within the ambit of the court's previous decision in the *Country Life Apartments v. Buckley* case. *Comparison of the facts of the Knight case with those in this litigation will show the cases to be plainly differentiable.*
>
> "* * * *
>
> "The contrast of the simple alteration approved in *Knight v. Wertheim, supra*, with the alterations and modifications proposed here is most striking. It would seem that any careful analysis of the plan which has been confirmed with the result reached should the alterations and modifications of Kern be adopted clearly demonstrates that his offering constitutes actually a *completely new and altogether different plan.*"

We find no decisions of this Court on the question of what constitutes bona fide alterations and modifi-

cations and what constitutes a new plan. No doubt the reason is that this Court has not seen fit to inquire into the details necessary for an examination of the question of whether or not the District Court properly exercised its discretion in determining what constitutes alterations and modifications and what constitutes a new plan. Here the District Judge, who has lived with this case for almost a generation, and who has an intimate knowledge of it, exercised his discretion and found that the so-called alterations and modifications were a new plan and for that reason should not be permitted to be filed. The Court of Appeals, also well acquainted with this case, affirmed.

It is respectfully urged that this is not a matter justifying the attention of this Honorable Court.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

SELDEN S. McNEER,
Counsel for respondent
Ben Williamson, Jr., Trustee of
Inland Gas Corporation and Kentucky Fuel Gas Corporation

CAMPBELL, McNEER, WOODS & BAGLEY,
ROBERT K. EMERSON,
Of Counsel.